NETWORK FOODS (M) SDN BHD

v.

SYABINAS HOLDINGS SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: 22-234-96]
30 JANUARY 1997

CIVIL PROCEDURE: *Pleadings - Illegality - Illegality not pleaded - Whether can adduce evidence of illegality - Tenancy agreement - Premises did not possess certificate of fitness for occupation - Preliminary objection - Solicitor - Duty of - To bring attention to illegality*

The plaintiff was the tenant of certain premises owned by the 1st defendant ('the Properties') pursuant to a tenancy agreement between them. Dispute arose as to whether the tenancy was to be extended. In the meantime, the 1st defendant sold the Properties to the 2nd defendant. The plaintiff filed the present writ seeking a declaration that the plaintiff's tenancy was binding on the 1st and 2nd defendants, that the 1st defendant be liable in damages, and that injunctions be granted to prevent the defendants from disturbing the plaintiff's enjoyment of the Properties.

At the hearing, Counsel for the 1st defendant brought up the issue that the Properties did not possess a certificate of fitness for occupation, and as such the tenancy agreement was illegal. Counsel for the plaintiff then informed the Court that they had been informed only the previous Friday about this and they would require time to amend their claim in view of the new development. The case was then postponed to a later date to hear the question of certificate of fitness.

When the case came up for hearing again, Counsel for the plaintiff made a preliminary objection that since the defendants had not pleaded illegality, and since illegality was not apparent from the documents, the defendants could not adduce any evidence of the absence of a certificate of fitness.

Held:

[1] It is a trite law of pleadings that a party may not rely on a point unless it has been specifically pleaded. For this reason, the starting point is always whether that point has been specifically pleaded. The Court however, being a Court of law, cannot and will not enforce illegal contracts. Thus, where the Court finds that a contract is on its face illegal, the Court will not enforce it, whether illegality has been pleaded or not.

[2] This rule against the enforcement of illegal contracts has been further stressed by the Court of Appeal in *Mustafa Osman v. Lee Chua & Anor* where it was held that illegality need not be specifically pleaded. Once illegality has been brought to the attention of the Court before whom the action was being tried, the Court, upon being satisfied the transaction was indeed illegal, was obliged to act upon that knowledge, in other words to refuse to enforce it.

[3] It does not matter that notice was brought to the attention of the Court at the beginning of the trial by Counsel or in the course of evidence. It is the Counsels duty as an officer of the Court to bring to the attention of the Court if it is in danger of enforcing an illegal transaction at any time he becomes aware of it. Bringing the matter to the attention of the Court at the beginning of trial enables the Court to deal with the issue without wasting time as well as incurring additional costs, and is therefore the preferable course of action.

[Preliminary objection dismissed with costs.]

Cases referred to:
Scott v. Brown, Doering, McNab & Co [1892] 2 QB 724 ***(cit)***
Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 1 CLJ 1192 ***(refd)***
Mustafa bin Osman v. Lee Chua & Anor [1996] 3 CLJ 494 ***(foll)***
Mercantile Credit Co Ltd v. Hamblin [1964] 1 WLR 423 ***(refd)***

Other source referred to:
Contracts, Chitty, 27th edn., para. 16-174, p. 885

For the plaintiff - T Vijay; M/s T Vijay & Co
For the 1st defendant - AM Pillay; M/s Soraya Chuah & Assocs
For the 2nd defendant - Alvian Julian; M/s Paul Chong & Kraal

JUDGMENT

Abdul Wahab Patail J:

The plaintiff had filed this writ of summons on 25 June 1996. An appearance was filed by the first and second defendants on 3 July 1996 and 28 June 1996 respectively. At a summons for directions hearing on 5 September 1996 this case was set down for trial for two days starting on 21 October 1996, with the direction for documents to be filed by 17 October 1996.

The background facts are as follows. The plaintiff is the tenant of certain premises owned by the first defendant pursuant to a tenancy agreement dated 23 September 1993, 29 April 1993 and 19 December 1995. There is a dispute as to whether the tenancy is to extend until 31 December 1997. In the

meantime the first defendant has sold the property to the second defendant. The plaintiff filed the writ for declarations that the plaintiff's tenancy is binding on the first and second defendants, that the first defendant is liable in damages in the sum of RM500,000 and injunctions to prevent the defendants from disturbing the plaintiffs' enjoyment of the premises or to interfere with the supply of water and power to the premises.

On 21 October 1996 Counsel for the first defendant brought up the allegation that the building does not possess a certificate of fitness for occupation. It was pointed out that in such case the tenancy agreement is illegal.

It was mentioned by Counsel that this was brought to his attention the previous day by the second defendant Counsel. Counsel for the plaintiff thereupon informed the Court that they have been informed only the previous Friday that there is no certificate of fitness, and may require to amend their claim in view of the new development. The case was then postponed to 12 December 1996 to hear on the question for certificate of fitness, with Counsel to apply if necessary for subpoena to call witness from the local authority if required.

That hearing was postponed to the next day when Counsel for the first defendant appeared, mentioning on behalf of Counsel for plaintiff and the second defendant, and informing the Court that only one witness would be produced, there being no witnesses by the other parties. The Court gave a new date: 20 January 1997. Counsel was instructed to inform all parties concerned.

Now Counsel for the plaintiff makes this preliminary objection that evidence of illegality cannot be admitted in circumstances where it has not been pleaded and where the Court cannot determine from the *ex facie* appearances that it is illegal. Hence since the defendants have not pleaded illegality, and since illegality is not apparent from the documents, the defendants may not adduce any evidence of the absence of a certificate of fitness.

The reply by the first defendant is in three parts. Firstly that Counsel for plaintiff had not raised his objections earlier when the issue was brought to the attention of the Court on 21 October 1996, but have only raised the objection now. Secondly, since the absence of the certificate of fitness has been brought to the attention of the Court, the Court is obliged to act upon it. Reference to it has been raised in the witness statement submitted to the plaintiffs' Counsel as well as filed in Court. Finally, it is in breach of s. 28 of the Uniform Building Bylaws, and regardless of the tenancy agreement the premises cannot be occupied. The first defendant as owner has a right to possession.

Counsel for the second defendant in his brief submission supported the above arguments and added that one of the pre-conditions of the tenancy agreement is that the plaintiff obtained a certificate of fitness for occupation. Since the question of illegality is on the Court record, the matter falls within the exception to the requirement that it be pleaded specifically.

Counsel for the plaintiff replied that there is no obligation on his part to bring up this objection earlier. If the defendants think there is this illegality, it is for them to amend their pleadings. If the Court allows this evidence to be admitted, the plaintiff will be at a disadvantage or loss since if the defendants amended their pleadings, the plaintiff could also apply for amendment.

It is trite law of pleadings that a party may not rely on a point unless it has been specifically pleaded. For this reason, the starting point is always whether that point has been specifically pleaded. The Court however, being a Court of law, cannot and will not enforce illegal contracts: see Lindley LJ in *Scott v. Brown, Doering, McNab & Co.* [1892] 2 QB 724, 728. Thus where the Court finds that a contract is on its face illegal, the Court will not enforce it, whether illegality has been pleaded or not. In the Supreme Court case of *Lim Kar Bee v. Duofortis Properties (M) Sdn. Bhd.* [1992] 2 MLJ 281, it was also held that even where a contract is not on its face illegal and the issue has not been raised in the pleadings, the Court can still take judicial notice of illegality and refuse to enforce the contract when facts emerge in evidence in the course of trial showing clearly the illegality. This rule against enforcement of illegal contracts has been further stressed, and in very clear terms, by the Court of Appeal where it held that illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the Court before whom the action is being tried, the Court, upon being satisfied the transaction is indeed illegal, is obliged to act upon that knowledge, in other words to refuse to enforce it: see *Mustafa bin Osman v. Lee Chua & Anor.* [1996] 2 MLJ 141, 146.

Counsel for the plaintiff had firstly cited Chitty on *Contracts* 27th Edn., para. 16-174 at p. 885, for his argument that there is nothing on the face of the tenancy agreement that it is illegal, period and further argues that the fact of illegality must emerge from evidence in the course of trial before the Court can act upon it. This argument ignores the fact that notice of illegality was brought to the attention of the Court on the first day of the two days fixed for the trial. At that point Counsel for the plaintiff had informed the Court that he had only been informed the previous Friday and may need to amend the pleadings. To date no amendments has been filed. And only now after nearly three months the plaintiff has raised this objection. Much time has been wasted.

In the same passage above in Chitty on *Contracts* it is stated that it has been said that Counsel is not acting improperly in inviting the Court to consider the possible, though unpleaded, illegality of a transaction but that on the contrary counsels' duty is to prevent the Court from enforcing illegal transactions. In *Mercantile Credit Co. Ltd. v. Hamblin* [1964] 1 WLR 423,424, the plaintiffs Counsel had argued that the other Counsel ought not to draw the attention of the Court to unpleaded illegality without the point being taken by the Court itself, and defendants Counsel had argued that even if leave is not granted the Court should take cognizance of the illegality. The Court refused leave to amend and, finding for the defendant on other grounds, said that in his view, Counsel was not acting improperly in inviting the Court to consider the possible illegality of the transaction, and on the contrary, it was Counsels' duty, however embarrassing, to prevent the Court from enforcing illegal transactions.

It therefore does not matter that notice is brought to the attention of the Court at the beginning of the trial by Counsel or in the course of evidence. It is the Counsels duty as an officer of the Court to bring to the attention of the Court if it is in danger of enforcing an illegal transaction at any time he becomes aware of it. Indeed bringing the matter to the attention of the Court at the beginning of trial enables the Court to deal with the issue without wasting time as well as incurring additional costs, and is the preferable course of action.

The preliminary objection is hereby dismissed with costs.

Reported by Ling Hea Hoon